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II. THE GIANTS AND THE GODS.

At this day there is no need to explain that formality is an essential feature of archaic law. It has long ceased to be plausible, if it ever was, to regard strict insistence on form as a degeneration from some better pattern of justice which our remote ancestors were supposed to have followed in a simpler golden age. Persons who talk of primitive simplicity, if any still do, confound rudeness of instruments and poverty in execution with simplicity of ideas. Prehistoric language, customs and superstitions are exceedingly complex. If there was ever an earlier stage in which they were otherwise, we know nothing of it. The history of modern culture is, in essentials, a history of simplification.

Now formalism in law and procedure seems to have two roots, one rational and the other irrational. The rational ground is the need of a hard and fast rule to make it clear that the law is the same for all men. Suitors in the early age of regular justice are highly suspicious of personal favour and caprice and will not hear of giving any room for discretion. As they apprehend it, a Court once allowed to relax the customary forms could make of the law itself whatever its members and managers for the time being pleased. The irrational ground goes back to the oldest form of superstition, older than both statecraft and priestcraft, the prehistoric belief in symbolic magic. It is assumed that words have in themselves an operative virtue which is lost if any one word is substituted for any other. He who does not follow the exact words prescribed by the legal ritual does not bring himself within the law. If the Twelve Tables gave an action for damage to 'trees' it would not do to say 'vines;' any such variation was to early Roman ears not only futile but almost blasphemous. A

medieval English lawyer might have compromised on a *videlicet* and allowed 'certain trees of the plaintiff, to wit, vines,' to be well enough. These two motives, jealousy of personal authority and superstitious worship of the letter, are as different as possible in origin and nature, but they are by no means inconsistent. Rather they have been a pair of hands to tie the magistrate fast in bonds woven with the double strand of magic and policy. Between them they have fostered, all the world over, official and professional attachment to form for form's sake, a passion with which we have all made acquaintance at some time, to our greater or less vexation. Its operation is not at all confined to legal proceedings. Neither of the motives now mentioned will go very far towards accounting for the actual origin of ceremonies and formulas. For that purpose other causes would have to be discussed, and in particular the taste or instinct which leads men to clothe their collective action in dramatic and rythmical shapes; an instinct not without a practical side, as the symbols it creates are both impressive at the time and easily remembered. Ritual of one sort and another answers to a desire that lies pretty deep in human nature. But the further analysis of this, whether simple or complex, would help us very little just now. Certainly it would not explain why legal forms, or any form, should be treated as invariable, for that is by no means a universal attribute of ceremonies. It is quite possible to have a type of ritual, even elaborate ritual, with considerable room for variations; longer and shorter alternative recensions and so forth. It is no less possible to be strict in matters of detail without holding that a slip is fatal. Opinions differ as to the value of smartness in drill and equipment beyond what is positively needful, and some officers have been martinets. But surely no commander ever went so far as to tell his subalterns on the eve of going into action, that the battle would infallibly be lost, if a single button was awry. Therefore it seems to me that we must not be tempted to dally with the aesthetic history of ritual at large. It is too remotely connected with our specific subject of legal formation, and we may leave anthropologists to settle its proper place and importance in their own learning.

There is an important distinction to be noted in the ways of early Germanic and probably of other procedure. It is not correct to say that everything was formal, but rather that, whenever form was required, no relaxation or amendment was admissible.

When the members of the Court (originally the whole of the assembled free men) had the means of acting on their own immediate knowledge, they could act without any form at all. Thus, in criminal justice, the manslayer who was pursued and caught red-handed was put to death without ceremony; this was so in England down to the thirteenth century. Thus, in civil matters, it seems the county court could itself bear witness to a disposition made by a landholder whose right to make it was admitted, and then give judgment accordingly.[1] Let the fact be disputed, however, and our ancestors' minds were at once filled with deep distrust of human testimony and entire disbelief in the power of human judgment to discover the truth, perhaps also in the existence of any impartial will to discover it. An external standard was demanded, but not in the rational sense in which my friend Justice Holmes has taught us to use the term. In this manner we find that formalism is at its strongest in archaic methods of proof, while executive acts, partly but not altogether by the necessary reason of their nature, are to a great extent exempt from it.

Now as to proof, the archaic view of it is quite simple. I do not say evidence, because there are no archaic rules of evidence; the conception is unknown. Evidence is offered with a view to leading a judge or a jury to some inference of fact which may determine or help to determine the decision of the case as a whole. But the archaic proof comes after judgment, not before. It is adjudged that John or Peter is to make his proof. Not that he is bound to make it, as a modern student is tempted to think, but that he is entitled to make it, that he has the prerogative of proving as they said in comparatively modern Scottish practice. Formal affirmation by the plaintiff generally reinforced by a 'suit' of fellow-swearers, has been the first step. It has been met by denial, a formal denial which, on pain of failure, had to traverse every point of the plaintiff's assertion word for word. The Court awards proof to one or the other party, and then he is in possession of the cause. Let us suppose that the proof is by oath, which is the most regular and instructive case. There is a process by which the adversary can stop the oath if he will, at his peril, challenge the swearer and his helpers as incredible. He may seize the hand before it is uplifted to swear, or before it touches the relics on which the oath is to be made; he may bar the way into

[1] Kemble, Cod. Dipl. DCCLV; Essays in Anglo-Saxon Law, p. 365.

the church by stretching his arm or his sword across the door. Herein, as in all steps of archaic procedure, he acts, at best, at his own risk. But he must act at exactly the right moment. The oath, once begun, may not be interrupted. Every one who has seen the 'Götterdämmerung' will remember Brünnhilde's attempt to 'levy' Siegfried from his oath, not before he swears, but after he has sworn. Wagner took no more license than many other dramatists have taken, surely none so great as the wholesale violation of natural as well as legal justice which is accepted without demur—such is Shakespeare's art, in the suit of Shylock against Antonio. No one is troubled there by a civil action being turned without notice into an official prosecution of the plaintiff for an offence of which no one has accused him; and in the 'Götterdämmerung' nobody minds Brünnhilde's interruption being out of time. But I fear the only possible judgment of Gunther's court, off the stage, would have been that the proceeding was altogether irregular. Siegfried's 'prerogative of proving' should have been challenged before he could speak a word.

On the other hand, the oath-taker and his helpers, when they have begun, must perform their parts exactly, not only in word, but in gesture. A hand held up must not be lowered, a hand laid on relics, or on a sword, or on the oath helpers' hands, must not be moved until the oath is fully spoken.[2] If nothing goes wrong in the solemnity, if all the right words are said in the right order, if all hands and fingers keep their right station, and if, all being duly done, the customary pause has elapsed without any one being visibly smitten by the divine wrath for perjury, then the proof is not only complete but conclusive.

What has been said about proof not being a burden but an advantage does not apply to trial by battle, nor to the other kinds of 'judgment of God,' namely ordeal by fire or water. In the case of battle, the parties have an equal chance. As for the man sent to the ordeal, he is already half condemned; if he were of good repute he would have claimed, and would have been allowed, to clear himself by oath. What he gets is a last chance of escape, and a better one, apparently, than most moderns would guess. Offers to prove claims by any form of ordeal, *'omnibus modis'* or *'omnibus legibus,'* may be found, no doubt, from Domesday Book

[2]Brunner, D. R. G. ii. 433, and Forschungen zur Gesch. des deutschen u. französ-Rechts, 385, 386. In some French custumals rules of this kind are recorded as still in force, with only slight relaxations, in the late fifteenth century, as appears from the passage last cited.

onwards. I have never met with any case of such an offer ripening into performance, and I strongly suspect that they were not seriously meant or taken.

Neither ordeal nor trial by battle could be reduced to strictly ceremonial proceedings. And yet it is abundantly clear that trial by battle in civil cases did from an early time tend to become little more than a picturesque setting for an ultimate compromise. The parties agree at the last moment; the judges call on the champions to strike a blow or two, 'the King's stroke,' for sport; the 'horned staves'—representing, it seems, the Frankish double axe—resound on the targets; the shaven and leather-coated professionals depart lovingly, we may presume, to drink up a competent portion of their fees; and the public, we hope, think the show was good enough without any slaying or hanging. Also we read of much incidental and preliminary ceremony: the champion's gloves are offered to the Court with a silver penny in every finger, and, contrary to the intention of preventing perjury, which was originally given as the reason for the judicial duel, there is elaborate swearing. But it does not appear that every detail was essential, or that the whole thing would have come to naught if, for example, only four pennies had been found in one of the gloves. In fact, the medieval writings in which the ritual of the judicial combat has been described at various times are pretty strong to show that at none of those times was the proceeding common enough to be fresh in any one's memory. Perhaps even in the fourteenth century, certainly in the sixteenth, it was an antiquarian pageant in which little mistakes were very possible. On the last occasion when battle was waged, in the early nineteenth century,[3] a fearfully and wonderfully adorned glove, supposed to be of medieval pattern, was thrown down in Court. It was remarkable for having no fingers at all,[4] which would have been incorrect in a writ of right, but some one may have thought it was the proper practice in an appeal of felony. Long before this, however, the picturesque

[3]The well known case of Ashford *v.* Thornton, see Stephen, Hist. Cr. Law, i. 249. It is perhaps a superfluous precaution to remind the reader that there was no battle; the appellant hoped to persuade the court that the case was so clear against the appellee as to deprive him of the right to 'defend the same with his body.'

[4]Neilson, Trial by Combat, 329. All the authorities on the subject, I believe, are collected in this excellent book. A note of the ceremonies made in 1346 was edited by Mr. Pike, among other unprinted cases, in 1908: Y. B. 20 Ed. III (Rolls series), p. 483. A still earlier one (1330) was printed by Dugdale, Orig. Jurid. 68, from a Lincoln's Inn MS. The fact that a minute report was thought worth making at those dates is significant.

aspect of the ceremony had prevailed over the real archaic faith which takes adherence to every point of form in dead earnest. There is already something consciously romantic about the later generations of the Middle Ages. Perhaps this was not the least fatal symptom of decay.

Such were the strange guardians among whom our lady the Common Law was born and cradled. For they were true guardians in their day. Caprice, even well meant and at times, as it might chance, well doing caprice, had to be kept at arm's length at all costs. Better even bad rules than a rule which is not of law. It was a great and a true word that Jhering spoke when he said: "Form is the sworn foe of caprice, she is Freedom's twin sister."[6] The giants of the prime are stark and grim figures in our sight, yet their force cleared a way for the Gods through chaos, and without them the Gods would never have come to Valhalla. But the guardians became tyrants when, in a community growing civilized, the judicial results of a semi-magical ritual ceased to be tolerable, and the so-called judgments of God were openly deemed unjust alike by men of war and by men of religion. Their ways could not be mended; they must be broken, and a new body must be fashioned for the justice which in its old embodiment was too visibly blind even in the eyes of the twelfth century suitors. The masters who were no longer protectors but appressors must be fought with and overthrown if the law were to be made an organ of living righteousness. Truly the spirit of our infant laws had need of a mighty champion. It was written of the Church that kings should be her nursing fathers. No less truly might it be said of the Common Law. The king's overriding power, a power both to devise and to execute, was the only one strong enough for the work. Royal inquests, royal precepts and decisions, ingenuity of royal officers at least as eager to bring fees into the king's coffers and enhance the reputation of the king's court as to procure ease and satisfaction to suitors, were the means, not precisely of abolishing the inflexible and cumberous old procedure—we had not formally begun to abolish anything—but of relegating it to an obscurity where it was speedily forgotten, and so completely forgotten too that professed antiquarian lawyers could, almost down to our own time, believe trial by jury to be immemorial. Indeed, we should be speaking almost literal truth if we said that our lady the Common Law never had much trouble with the forms of archaic proof.

[6] Geist des röm. Rechts, ii. 471 (4th ed. 1883).

By the time she had got to serious work they were hardly more dangerous than Giant Pagan. Proof by oath lingered through the Middle Ages, and much later, in the wager of law, but in so many ways hampered and discouraged that it is already something of a curiosity in the sixteenth century. Monsters of this brood are, at a modern lawyer's first sight, clumsy lubber fiends from whom there is not even the sport of a good fight to be had. The real danger was more insidious. The ancient rigid formalism was dead but not exorcised, and the ghost of it walked, in some jurisdictions it still walks, disguising itself under more or less plausible reasons of logic or expediency. Without letting ourselves be too much entangled in the maze of technical details, let us now see how this came about.

Whatever we may think of the king's new justice, as it stood between six and seven centuries ago, comparing it with all that we have learnt and accomplished since, there is no doubt that it was immensely more rational than the prehistoric methods it supplanted, or that its rapid success was due to its merits. The king did not want to make it cheap; it had to support itself and be a source of revenue. It was not to be had at all times or at all places; the commissioners of assize carried it round the country, but at considerable intervals. As for the older visitations of itinerant justices, the justices in eyre as they were called, they were quite as much bent on collecting fines, and discovering the irregularities which bred them, as on improving the administration of the law. Their appearance was certainly not welcome in the latter days of the thirteenth century, if it ever had been; and in the course of the fourteenth century the cumbrous machinery of the eyre was wholly superseded by the more convenient jurisdiction of the justices of assize. Otherwise no special pains were taken to make the king's courts easy of access or attractive, though there are indications that the king's judges had the deliberate purpose of keeping the old popular courts in a lower place. When we speak of their jurisdiction and methods as supplanting those of the county court, it must not be understood that the process was sudden, or was ever logically completed. Our lady the Common Law is not like a tidy French housewife whose broom sweeps out all the corners; one doubts whether she ever will be. Remnants of archaism, wager of law and such like, hung about the older forms of action. Still the characteristic merits of the king's justice were great, and its own. So far as it had a free hand, it did not charge men with crimes on suspicion and drive

them to clear themselves, if they could, by absurd and precarious tests. It did not decide civil controversies by counting oaths or by competition in exact knowledge of verbal formulas. It did make some serious attempt at ascertaining facts and applying intelligible rules of law to the facts of which the Court was possessed by admission or proof. Pleading in civil actions, down to the fourteenth century, was already a game of skill, but it was played by living discussion before the judges, who acted as moderators and directors. It ended, not in a judgment, but in a preliminary settlement of the points at issue. To understand the necessary limitations and the real merit of the systems, we must remember that the king's Court did not profess to have universal jurisdiction. It provided certain remedies in certain cases which the king thought worthy of his interference. The plaintiff had to show the Court how the facts he alleged brought him within some species of justice it professsed to do. He could not tell his story at large and leave the Court to find, with or without the aid of advocacy, what law was applicable. A dialetic process of some kind as necessary to fix the point for adjudication, and to guide the future practice of the professional counsellors who were now becoming the servants of the law. This creative dialetic, working on a still fresh and plastic material, is what we find in the earlier Year Books; not official or formal records (as we now know, thanks to Maitland, and as at least one American scholar suspected before), but notes of young lawyers keen on learning their business, and eager to make sure how far they could venture to be ingenious without rashness. They cared very little who the parties were, and less about the end of the case. Good pleading was their ambition; the art which commanded the approval of the Court and the confidence of clients, and might lead them one day to be serjeants themselves, canvassing points familiarly with the judges, and bring a fortunate few of them even to the Bench. When the semi-official talking in any cause in the Common Pleas was done, the students knew pretty well what was sound pleading in the general opinion of the judges and serjeants. To be sure, some counsel were more obstinate in their own views than others. In the very latest days of oral pleading counsel might say to the Court, thinking his adversary had not the courage of his invention: Surely he will never dare to put that on the record! But in this case the Court promptly said it was well enough, and enrolled it on the spot.[6] What goes on the record after discussion is

[6] 42 Ed. III, 4, pl. 14 *ad fin.* (the text as printed is not free from difficulty).

understood to be informally passed as good. Only the graver doubts are set down as matter for solemn decision. Then we have meetings of all the judges at which they argue with counsel and with one another, take new points, throw out hints and warnings for the benefit of juniors, with all the zest of their earlier days in the profession. It was a highly technical affair, no doubt. Medieval lawyers and probably medieval laymen would have been shocked at the suggestion that it could be anything else. But the system was very far from being a hide-bound formalism. It was spoilt by abuse of its own power of free and varied development.

Technical dialetic is an excellent servant; the lay people may talk as they please, after their own 'talent' as the Year Books say, but every lawyer who has sat on committees knows that untrained amateur pedantry can be both more absurd and more unjust than any professional bias. Nevertheless good servants often want to be masters, and make very bad masters when they get their way. So it happened with common-law pleading and procedure. The mischief cannot be ascribed in any great measure to the partial survivals of extreme archaism. Those curiosities, as they occur in relatively modern law-books, have received quite as much attention as they deserve for any purpose except that of pure archæology. Various devices kept them within bounds which made them practically harmless. It is true that this was not done without paying a price for it, but that is not the subject immediately before us. On the whole, what little was left of the genuine ancient formalism caused less inconvenience than might have been expected. But the old spirit of it was scotched, not killed, and the ghost fell to work, with only too much success, to effect a lodgment in the new body. John Bunyan made a pretty bad mistake when he represented Giant Pope as decrepit; if he could have looked outside England he would have seen the counter-reformation making its conquests. Probably Henry of Bratton, perhaps even Glanvill or the learned clerk who wrote under the shield of his name, was sanguine enough to hope that no man would dare to make new rubbish-heaps where once the king's broom had swept. If so, they were mistaken in the same sort. The new material itself was attacked by a parasitic growth of later medieval exuberance. Form for form's sake had been a stern mistress; the demon of subtilty for subtilty's sake was an alluring siren. Her charms might not allure us very much; they were fatal to scholars whose intellectual habits were in many ways like those of a clever schoolboy. The tendency to useless refinement

is apparent even during the time of oral pleading; but the fatal step was the change from open discussion in Court to the delivery of written pleadings between the parties without any judicial control. Future editors of the later Year Books will probably be able to clear up various details. The main points of the story, however, have long been well known.[7] Inasmuch as this newer formalism was not honestly archaic but must rather be classed, from an artist's point of view, as a product of flamboyant archaistic decadence, we need not feel bound to treat it with any respect.

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[7]They were set forth in the early nineteenth century in an excellent book which is perhaps more honoured at this day in America than in the mother land, Stephen on Pleading. Fuller confirmation has been added by later scholars, such as (to speak only of my own countrymen) Maitland, Mr. Pike, and Dr. Holdsworth; all of them accept Stephen's account as correct in essentials.